ROSEMARY S. POOLER, *Circuit Judge*, joined by Judges CHIN and CARNEY, dissenting from the denial of rehearing en banc:

By denying rehearing en banc in this case, respectfully, this circuit yet again misses an opportunity to correct the panel's majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), an opinion which is almost certainly incorrect but continues to maintain a needless circuit split with *every* other circuit to address the question of whether corporations may be held civilly liable under the Alien Tort Statute ("ATS"), *see Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x. 7 (D.C. Cir. 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747 (9th Cir. 2011), *vacated on other grounds,* 133 S. Ct. 1995 (2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). "[O]n the issue of corporate liability under the ATS, *Kiobel I* now appears to swim alone against the tide," *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015), and it is

the lone "outlier" among ATS cases, *Flomo*, 643 F.3d at 1017. [1] When our mistakes are exceptionally important, we should not let an opportunity to correct them pass, especially when a flawed opinion categorically bars litigation, thereby blunting the natural development of the law.

"[W]e have not in the past denied *in banc* review because the opinion is too wrong," *United States v. Bert*, 814 F.3d 591, 594 (2d Cir. 2016) (Jacobs, *J.*, dissenting from the denial of rehearing en banc), and this case presents the same issue as *Kiobel I*. Because the issue of corporate liability under the ATS remains a "matter of extraordinary importance," *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011) (Katzmann, *J.*, dissenting from the denial of rehearing en banc); *see also id.* (Lynch, *J.*, dissenting from the denial of rehearing en banc) ("[T]his case presents a significant issue and generates a circuit split . . . ."), I would rehear this case. I therefore respectfully dissent.

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[1] My colleagues defending the decision to deny rehearing have not even attempted to explain how the rest of the circuits are incorrect. Instead, they have focused almost all their attention on their speculative belief that however wrong *Kiobel I* may be, we need not correct the opinion because, as a practical matter, claims against corporations have been entirely foreclosed by the Supreme Court's decision upholding our panel's judgment on entirely different grounds. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) ("*Kiobel II*") (holding that the ATS is subject to the presumption against extraterritorial application of statutes). This questionable position not only reflects the weakness of *Kiobel I*'s holding, it misunderstands *Kiobel II*, and unfairly blocks litigants from accessing the courts and developing unsettled law. *See infra* Part II.

I

A

The ATS grants U.S. district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "[B]y its terms[,] [the ATS] does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). And more than a century ago, even forty years before the wellspring of human rights litigation of the International Military Tribunals at Nuremberg, the U.S. Attorney General opined that the United States had long recognized that corporations are capable of violating the law of nations for purposes of the ATS. *See* Mexican Boundary-Diversion of the Rio Grande, 26 U.S. Op. Att'y Gen. 250 (1907) (concluding that aliens injured by a corporation's conduct in violation of a treaty between Mexico and the United States could maintain an action under the ATS). But in *Kiobel I*, though the issue had never been briefed or raised by either party, a panel majority of this court took it upon themselves to conclude that "[b]ecause corporate liability is not recognized as a 'specific, universal, and obligatory' norm, it is not a rule of customary international law that we may apply under the ATS." *Kiobel I*, 621 F.3d at 145 (citation omitted) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

From the very outset, the panel majority erred by framing the question in the wrong way: whether there is a "norm of corporate liability under customary international law." *Id.* at 131. "International law does not work that way." William S. Dodge, *Corporate Liability Under Customary International Law,* 43 Geo. J. Int'l L. 1045, 1046 (2012). Customary international law does not contain general norms of liability or non-liability applicable to actors. *Id.* As the United States argued as amicus curiae in *Kiobel II*, the *Kiobel I* majority erred by "examin[ing] the question of corporate liability in the abstract;" rather, the court should have inquired "whether any of the particular international-law norms [at issue in the case] . . . exclude corporations from their scope." Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *Kiobel II*, 133 S. Ct. 1659 (2013), 2011 WL 6425363, at *21 [hereinafter U.S. Amicus Br., *Kiobel II*]. Other circuits have correctly observed that the proper mode of inquiry is to apply a "norm-by-norm analysis of corporate liability," *Nestle USA*, 766 F.3d at 1021-22. For each ATS claim, courts should look to international law and determine whether corporations are subject to the norms underlying that claim. *See Sarei*, 671 F.3d at 748 ("*Sosa* expressly frames the relevant international-law inquiry to be the scope of liability of private actors for a violation of the 'given norm,' i.e. an

international-law inquiry specific to each cause of action asserted." (quoting *Sosa*, 542 U.S. at 733 n.20)). Simply put, there is no categorical rule of corporate immunity *or* liability. *See id.* at 747-48.

B

The *Kiobel I* majority's errors have long been traced to the majority's "misreading of footnote 20 in the *Sosa* opinion." U.S. Amicus Br., *Kiobel II*, at *16; *accord Kiobel I*, 621 F.3d at 163-65 (Leval, *J.*, concurring in the judgment). In footnote 20, the Supreme Court explained that the question related to "the determination whether a norm is sufficiently definite to support a cause of action" under the ATS "is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. The thrust of the footnote is that *if* the defendant is a private actor, the court must then determine whether private actors are *capable* of violating the international norm at issue. U.S. Amicus Br., *Kiobel II*, at *17. This simply reflects the established rule in international law that some international norms apply only to state actors (*e.g.*, torture, which requires some involvement of a state actor or an individual acting in a public capacity), whereas others, such as genocide, do not

require the involvement of state actors. *Compare* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85, 113-14, *available at* www.ohchr.org/EN/ProfessionalInterest/Pages/Cat.aspx (defining torture as conduct performed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"), *with* Convention on the Prevention and Punishment of the Crime of Genocide, art. II, opened for signature Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%2078/Volume-78-I-1021-English.pdf (defining "genocide" to include "any of the following *acts*" committed with intent to destroy a group (emphasis added)). The *Kiobel I* majority misread this footnote "as a basis for drawing a distinction between natural and juridical persons—one that finds no basis in the relevant norms of international law." U.S. Amicus Br., *Kiobel II*, at *18. As the United States noted, the footnote "groups *all* private actors together, referring to 'a private actor such as a corporation *or* individual.'" *Id.* (first emphasis added) (quoting *Sosa*, 542 U.S. at 732 n.20). "Both natural persons and corporations can violate international-law norms that require state action. And both natural persons and corporations can

violate international-law norms that do not require state action." *Id.* at *21. "The majority's partial quotation out of context, interpreting the Supreme Court as distinguishing between individuals and corporations, misunderstands the meaning of the passage." *Kiobel I,* 621 F.3d at 165 (Leval, *J.*, concurring in the judgment).

C

The *Kiobel I* majority also justified its conclusion by noting that "no international tribunal has ever held a corporation liable for a violation of the law of nations" and that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights." *Kiobel I*, 621 F.3d at 120, 121. But as Justice Kagan remarked, simply because there is no case in international law "about Norwegians," that does not mean that a particular norm "does not apply to Norwegians." Transcript of Oral Argument held on Feb. 28, 2012 at 27, *Kiobel II*, 133 S. Ct. 1659 (2013) (No. 10-1491).

Indeed, "[t]here is always a first time for litigation to enforce a norm; there has to be." *Flomo*, 643 F.3d at 1017; *accord Sarei*, 671 F.3d at 761 ("We cannot be bound to find liability only where international fora have imposed liability."); *Nestle USA*, 766 F.3d at 1021 ("[A] norm c[an] form the basis for an ATS claim

against a corporation even in the absence of a decision from an international tribunal enforcing that norm against a corporation."); *id.* (stating that "the absence of decisions finding corporations liable does not imply that corporate liability is a legal impossibility under international law . . . and . . . that the lack of decisions holding corporations liable could be explained by strategic considerations").

In any event, "[t]he factual premise of the majority opinion in [*Kiobel I*] is incorrect." *Flomo*, 643 F.3d at 1017. Violations of the law of nations have been brought against juridical entities, including against ships, throughout history in both domestic and international tribunals. *See, e.g.*, *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offen[s]e has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof."); *Flomo,* 643 F.3d at 1021 ("[I]f precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships."); *see also id.*

at 1017 (discussing the application of international legal norms against corporations in the aftermath of World War II).

D

Finally, the majority's policy concern, that recognizing corporate liability under the ATS "would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the [ATS] was enacted to promote," *Kiobel I*, 621 F.3d at 141; *see also Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, *J.*, concurring in the denial of panel rehearing), is sufficiently mitigated by the Supreme Court's decision that the ATS is subject to the presumption against extraterritoriality that can only be displaced where the relevant claim touches and concerns the United States with sufficient force, *see Kiobel II*, 133 S. Ct. at 1669; *see also id.* at 1664 (stating that by applying the presumption against extraterritoriality, the court was construing the ATS to "protect against unintended clashes" between U.S. and foreign law and avoid "international discord" and "the danger of unwarranted judicial interference in the conduct of foreign policy" (internal quotation marks omitted)).

II

Even though *Kiobel I* is almost certainly incorrect, a majority of this court seems to believe that rehearing in this case would be a fruitless endeavor because, as a practical matter, the class of cases foreclosed by *Kiobel I* have been foreclosed by *Kiobel II*. Not only is this pure speculation, but just because *Kiobel II* erected a sluice where *Kiobel I* built a dam does not mean we should not dismantle *Kiobel I*'s barrier to viable cases under the ATS—even if they amount to just a trickle, the litigants in those cases should have access to the courts.

If anything, *Kiobel II* strongly suggests that corporate liability *does* exist under the ATS. The Court's concluding discussion in *Kiobel II*, particularly its statement that "it would reach too far to say that mere corporate presence suffices" to displace the presumption of extraterritoriality, would be utterly incomprehensible to include if the Court also believed corporations were *categorically* immune from suit under the ATS. *See* 133 S. Ct. at 1669.

In any event, the insistence by some members of this court that *Kiobel II* forecloses this case and others like it seeks to draw far too much guidance from an opinion as split and abstruse as *Kiobel II*.[2] The Court's "touch and concern"

[2] For example, Justice Kennedy's concurrence confirms that *Kiobel II* "leave[s] open a number of significant questions regarding the reach and interpretation of

test is cryptic and has understandably divided the circuits.[3] *See Tymoshenko v. Firtash*, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) ("[T]he [Supreme] Court failed to provide guidance regarding what is necessary to satisfy the 'touch and concern' standard."). My colleagues voting against rehearing want clarity from

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the Alien Tort Statute." 133 S. Ct. at 1669 (Kennedy, *J.*, concurring). And it clearly establishes that the ATS might still apply to "human rights abuses committed abroad." *Id.* Additionally, if Justice Kennedy made certain to note that the door was still ajar to lawsuits against corporations, or at least certain cases concerning conduct on foreign soil, so did Justice Alito's concurrence, which argued the majority did not go far *enough*. *See Kiobel II*, at 1669-70 (Alito, *J.*, concurring).

[3] In this circuit, we have held that "neither the U.S. citizenship of defendants, nor their presence in the United States, is of relevance for jurisdictional purposes," *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014), and that "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*," *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013). The Fourth, Ninth, and Eleventh Circuits have held to the contrary, holding that U.S. nationality of the defendant is relevant to the "touch and concern" inquiry even if it is not conclusive. *See Doe v. Drummond Co.*, 782 F.3d 576, 596 (11th Cir. 2015) ("Although the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own."); *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) ("[T]he fact that Defendants are both U.S. corporations . . . , without more, is not enough to establish that the ATS claims here 'touch and concern' the United States with sufficient force."); *Al-Shimari*, 758 F.3d at 527 ("[C]ourts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action."). Further, the Fourth Circuit has noted that "it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory." *Id.* at 528; *see also Drummond*, 782 F.3d at 593 n.24 ("[I]t would reach too far to find that the only *relevant* factor is where the conduct occurred, particularly the underlying conduct.").

an opinion that does not offer it. What *is* clear is that *Kiobel II* did *not* shut the door to *all* cases against corporations or cases involving violations of international legal norms outside the United States. By categorically excluding corporations as a class of defendants, the *Kiobel I* majority is preventing the natural development of the law among the circuits as to the implications of the *Kiobel II* "touch and concern" test.

* * *

In short, *Kiobel I* was wrong. Every circuit to address the matter agrees that it is wrong. It is a disservice to the litigants in this case, and every other litigant with a potentially viable ATS case against corporate defendants, to rely on the Supreme Court to fix *our* error. *Kiobel I* places an unnecessary roadblock in front of litigation that can continue to help clarify a statute that, since *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), has proven to be an essential tool for victims of egregious human rights abuses perpetrated by both corporations and natural persons.